

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

- - -

IN RE: AUTOMOTIVE PARTS
ANTITRUST LITIGATION

Case No. 12-2311

Hon. Marianne O. Battani

THIS RELATES TO:

In Re: Wire Harness	2:12-cv-00101
In Re: Instrument Panel clusters	2:12-cv-00201
In Re: Fuel Senders	2:12-cv-00301
In Re: Heater Control Panels	2:12-cv-00401
In Re: Alternators	2:12-cv-00701
In Re: Windshield Wipers systems	2:12-cv-00901
In Re: Starters	2:12-cv-01101
In Re: Ignition Coils	2:12-cv-01401
In Re: Fuel injection Systems	2:12-cv-02201
In Re: Power Window Motors	2:12-cv-02301
In Re: Air Conditioning Systems	2:12-cv-02701
In Re: Windshield Washer Systems	2:12-cv-02801
In Re: Spark Plugs	2:12-cv-03001
In Re: Oxygen Sensors	2:12-cv-03101

MOTION HEARINGS

BEFORE SPECIAL MASTER GENE ESSHAKI
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Friday, December 9, 2016

*To obtain a copy of this official transcript, contact:
Robert L. Smith, Official Court Reporter
(313) 964-3303 • rob_smith@mied.uscourts.gov*

1 APPEARANCES :

2 VICTORIA ROMANENKO
3 CUNEO, GILBERT & LaDUCA, L.L.P.

4 STEVEN N. WILLIAMS
5 COTCHETT, PITRE & McCARTHY, L.L.P.

6 STEVEN F. CHERRY
7 WILMER, CUTLER, PICKERING, HALE and
8 DORR, L.L.P.

9 DANIEL T. FENSKE
10 JENNER & BLOCK

11 COLIN R. KASS
12 PROSKAUER ROSE, L.L.P.

13 ADAM C. HEMLOCK
14 WEIL, GOTSHAL & MANGES, L.L.P.

15 ADAM WOLFSON
16 QUINN, EMANUEL, URQUHART, OLIVER &
17 SULLIVAN, L.L.P.

18 ABRAM ELLIS
19 SIMPSON, THACHER & BARTLETT, L.L.P.

20 SHELDON H. KLEIN
21 BUTZEL LONG, P.C.

22 JEFFREY J. AMATO
23 WINSTON & STRAWN, L.L.P.

24 J. DAVID ROWE
25 DUBOIS, BRYANT & CAMPBELL

ANGELA A. SMEDLEY
WINSTON & STRAWN, L.L.P.

1 APPEARANCES: (Cont.) WILLIAM SHOTZBARGER
2 DUANE MORRIS, L.L.P.
3
4 MICHAEL SHAPER
5 DEBEVOISE & PLIMPTON
6
7 E. PAUL CAULEY
8 SEDGWICK LAW
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1	<u>TABLE OF CONTENTS</u>	
2	<u>MATTER</u>	<u>PAGE</u>
3	Renewed Motion to Compel Discovery.....	6
4	Denso's Motion regarding Discovery.....	17
5	Motion to Compel Enforcement of Subpoenas.....	24
6	Motion to Compel Production of Documents.....	67
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 Detroit, Michigan

2 Friday, December 9, 2016

3 at about 9:16 a.m.

4 — — —
5 (Special Master and Counsel present.)

6 SPECIAL MASTER ESSHAKI: Good morning everybody.

7 The first matter on the docket this morning is the
8 plaintiffs' motions to compel -- strike that. This is In
9 Re: Automotive Parts Antitrust Litigation, Master File
10 No. 12-md-02311. The first matter on the docket this morning
11 is plaintiffs' motion to compel, item number 1187 and 1188,
12 entitled the parties' renewed motion to compel discovery from
13 certain non-original equipment manufacturers, and this
14 concerns what I like to refer to as the request 31. This is
15 a motion by the plaintiffs to ask the original equipment
16 manufacturers to disclose to them certain information sought
17 under request 31.

18 I indicated to a lot of the people that I met with
19 yesterday that I have had an opportunity to review at length
20 the motion, the response, the reply and, in fact, even
21 reviewed the case law with respect to this motion, so I do
22 not see a need for oral argument.

23 Does anyone out there feel a burning desire to
24 present something, oral argument on this case, or can we
25 simply -- can I proceed with my ruling?

1 (No response.)

2 SPECIAL MASTER ESSHAKI: All right. Seeing no
3 indication I'm going to proceed with my ruling. Let me just
4 start out discussing the plaintiffs' motion. On January 19th
5 of this year, in addition to the joint motion to compel filed
6 against the OEMs, plaintiffs filed an additional motion to
7 compel. That motion sought production of documents subject
8 to request 31 in the serving party's subpoena, which
9 requested communications between the OEMs and the vehicle
10 parts suppliers, including defendants, regarding the
11 conspiracy and documents provided to the OEMs by vehicle
12 parts suppliers, including defendants, concerning the
13 conspiracy.

14 On March 24th, 2016 the motion was presented to me
15 and I held it in abeyance preferring instead to address the
16 OEMs' original -- a motion to compel from the OEMs. The
17 defendants objected to this motion to produce documents
18 claiming that subject to settlement privilege, and they cited
19 the case of Goodyear Tire and Rubber vs. Child's Power
20 Supply, decision of 6th Circuit, our own Judge Suhrheinrich,
21 establishing a privilege that protects all communications
22 made in furtherance of settlement regardless of whether the
23 communications are informal or done under the auspices of the
24 Court.

25 Plaintiffs make the argument that in that case the

1 parties had not yet sued, and therefore -- there was a case
2 pending but in this case there was no case pending and
3 therefore the settlement privilege should not apply.

4 They also argue that defendants cannot assert a
5 settlement privilege over the communications between --
6 because the OEMs never filed a case. Defendants come back
7 and assert that there is no need for a case to be pending for
8 the privilege to apply. There are some additional cases that
9 have developed after Goodyear.

10 It was surprising to me that in the case law that
11 has been cited, some as close as the Western District of
12 Michigan, which is our sister district in this state, that
13 many district courts are failing to follow the dictates of
14 Goodyear Tire, are finding ways to distinguish the case from
15 their particular case, and other district courts are simply
16 ignoring it and calling it bad law. I have not seen so many
17 cases challenging the rulings of an appellate court.

18 But some of the issues that I think all the parties
19 can agree upon are -- not issues but the rulings, evidentiary
20 privileges have to be narrowly construed. Privileges are
21 exceptions to demand -- for everyman's evidence and are not
22 likely created nor expansively construed for they are in
23 derogation for the search of truth; United States vs. Nixon.

24 Even under Goodyear Tire a settlement agreement is
25 not subject to exclusion based upon privilege. That's a

1 Western District case, Connan vs. Lake Superior and Ishpeming
2 Railroad Company. Settlement privilege extends only to
3 underlying discussions made during settlement negotiations
4 and not to the occurrence of settlement talks, the terms of
5 any settlement, or the settlement agreement itself; Ohio
6 Consumer Council vs. Puco.

7 Settlement privileges protect settlement
8 negotiations from discovery but does not extend beyond actual
9 negotiations to the terms of the final settlement agreement.

10 I am not going to go through the facts of Goodyear,
11 everyone knows the facts. I am -- I am in a bit of a
12 quandary because Rule 48, which the privilege is based upon,
13 indicates that settlement negotiations -- evidence of
14 settlement negotiations are not admissible. However, in the
15 discovery rule we know clearly that admissibility is not a
16 precondition to discovery, relevance is all that is
17 necessary.

18 In Goodyear, however, the Court indicated that
19 despite the clear language of Rule 408 that settlement
20 discussions are not admissible, the Court did, in fact,
21 create a new settlement privilege, and this Court, being
22 United States District Court for the Eastern District of
23 Michigan, and myself being the Master of Judge Battani --
24 strike that -- being Judge Battani's -- being the -- being a
25 master appointed by Judge Battani to address this case is

1 compelled to follow Goodyear.

2 As a consequence, I must hold that request
3 number 31 to the extent that it requests evidence of
4 settlement negotiations between the defendants and the
5 original equipment manufacturers will not be enforced, those
6 discussions and the evidence concerning those discussions are
7 barred. However, in my view the discussions that occurred at
8 the initial meetings where the defendants disclosed to the
9 original equipment manufacturers the existence of a
10 conspiracy, the nature, the scope and the duration of this
11 conspiracy, the parts that may have been involved in the
12 conspiracy are not settlement negotiations, they are a
13 prelude to settlement negotiations, they are disclosing the
14 wrongful acts, and settlement negotiations occurred after
15 that disclosure.

16 So to the extent that request 31 seeks information
17 concerning the initial meetings where the disclosures of the
18 conspiracy, the scope, the nature, the extent and the
19 duration and the number of parts were involved or discussed
20 they are not privileged. Additionally, I think even under
21 Goodyear the final settlement agreements that may have been
22 reached between the parties are not subject to settlement
23 privilege, so to that extent I am denying in part and
24 granting in part the plaintiffs' request to enforce rule
25 number 31.

1 The next matter on our agenda today is the -- I'm
2 sorry.

3 MS. ROMANENKO: Just a quick point.

4 SPECIAL MASTER ESSHAKI: Please identify yourself.

5 MS. ROMANENKO: Victoria Romanenko for dealership
6 plaintiffs.

7 Your Honor, I wanted to clarify, the request also
8 sought documents exchanged between the OEMs and suppliers,
9 suppliers in general, not just defendants, concerning the
10 conspiracy as well as internal discussions and discussions
11 with non-defendant suppliers regarding the conspiracy. It is
12 our understanding that these were not settlement discussions.

13 SPECIAL MASTER ESSHAKI: I'm afraid I can't make
14 that conclusion. Documents that were exchanged between the
15 parties -- once -- once the conspiracy has been identified,
16 once the wrong has been described, anything after that is
17 settlement negotiations. So that if the defendants were to
18 come back and say here is a spreadsheet describing all of the
19 parts involved, describing the markups that we imposed, how
20 long they went, where the parts were sold, what vehicles they
21 went into, are, in fact, settlement negotiations.

22 Similarly, if the OEMs are responding with their
23 own analyses of the damages that they calculate based upon
24 the information that was conveyed to them, again, those are
25 settlement negotiations and/or work products that are not

1 going to be subject to disclosures.

2 Your second point was?

3 MS. ROMANENKO: So my second point was internal
4 discussions within the OEM as well as discussions between
5 OEMs and non-defendant suppliers, ones that didn't
6 participate in the conspiracy.

7 SPECIAL MASTER ESSHAKI: Between defendants and
8 non-OEM suppliers?

9 MS. ROMANENKO: Between OEMs and non-defendant
10 suppliers.

11 SPECIAL MASTER ESSHAKI: Again, I'm going to fall
12 back on my ruling without knowing what this type of
13 information is. If it is disclosing the wrongful conduct,
14 the scope, the duration, the extent, those are not
15 privileged. If there are discussions that occurred regarding
16 here is a spreadsheet that shows what we think the damages
17 are and discussions occur internally at the OEMs saying this
18 is our analysis and this is how we should respond, I believe
19 those would be settlement negotiations, privileged and/or
20 work-product privilege, so once the dispute has been
21 identified the privilege in my mind attaches.

22 With respect to non-parties, I think the same thing
23 occurs, if a non-party -- a non-defendant comes in and says
24 to General Motors we have learned that this conspiracy
25 developed within our organization or we participated within

1 this conspiracy, describes it to General Motors, how long it
2 went, what parts were involved, so on and so forth, not
3 privilege. A settlement document with that non-party and
4 General Motors, not privilege. Anything between those two,
5 privileged.

6 MS. ROMANENKO: Okay. Understood. I understand
7 Snap-on states that a discussion about the ongoing business
8 relationship --

9 SPECIAL MASTER ESSHAKI: Yes, I know, and while I
10 find Snap-on to be very attractive and to be an exceptional
11 decision that is issued by a special master, somebody of that
12 low character in the judicial system, it is not controlling,
13 we are required to follow Goodyear.

14 MS. ROMANENKO: Okay. Understood. Thank you.

15 SPECIAL MASTER ESSHAKI: Would you please prepare
16 an order and would you share it with defendants, and once it
17 is approved send it back to me for entry and be sure to
18 include magic language about the appeal rights?

19 MS. ROMANENKO: As soon as we've got the transcript
20 available we will prepare an order and circulate it.

21 SPECIAL MASTER ESSHAKI: All right. Thank you.

22 MS. ROMANENKO: Thank you.

23 MR. FENSKE: Master, may I be heard?

24 SPECIAL MASTER ESSHAKI: Please, identify yourself
25 counsel.

1 MR. FENSKE: Dan Fenske for Mitsubishi Electric for
2 the defendants.

3 I just wanted to clarify one aspect of your ruling,
4 particularly on the settlement agreement point. Is Your
5 Honor ruling simply that the settlement agreements are not
6 privileged or are you actually compelling production?

7 SPECIAL MASTER ESSHAKI: I'm compelling production.

8 MR. FENSKE: Your Honor, as to that point our
9 position is if you read the plaintiffs' motion, in the motion
10 they don't ask for settlement agreements anywhere in the
11 initial motion, so our position -- we didn't address it in
12 our response brief because we didn't believe that's what they
13 were seeking, so our position is respectively that they
14 waived their motion only as to settlement agreements.

15 SPECIAL MASTER ESSHAKI: Ms. Romanenko?

16 MS. ROMANENKO: Your Honor, we disagree. We
17 requested all communications and negotiations between the
18 OEMs and suppliers concerning the conspiracy. A settlement
19 agreement is very clearly a communication between OEMs and
20 suppliers concerning the conspiracy. Defendants very clearly
21 knew that settlement agreements were at issue because in
22 their own cases that they cited, including Conlin, including
23 Snap-on, the Court decided -- or the Master decided that
24 settlement agreements were produceable. These were clearly
25 at issue, they clearly knew that this was going on, and if

1 they had anything further to say about it they would have
2 said it.

3 And I also will note that I think Your Honor even
4 mentioned that at the mediation, so if they had any further
5 points to make they could have made them in this follow-up
6 briefing that just occurred.

7 SPECIAL MASTER ESSHAKI: Give me a moment, please,
8 Counsel.

9 MR. FENSKE: Of course.

10 SPECIAL MASTER ESSHAKI: Okay. I can see how you
11 can take the position that the request 31 was limited to
12 communications between the OEMs and any defendants or other
13 part suppliers in connection with the facts described in
14 plaintiffs' complaint. In the interest of saving time, I'm
15 going to order that the settlement agreements be produced.
16 You can appeal that to Judge Battani.

17 MR. FENSKE: Okay. Your Honor, just before we move
18 on, we didn't brief this because it wasn't brought up in the
19 opening brief. However, we have basic relevance objections
20 to the production of settlement agreements at least as to the
21 moving plaintiffs' cases. The -- there are some case law
22 that says that settlement agreements are sometimes at some
23 point in the case relevant when the settlement agreement is
24 with an absent class member, for example. That would only be
25 relevant to the DPP cases, Your Honor. The DPPs have not

1 moved to compel production of these settlement agreements, so
2 we have a basic just relevance objection to their production.
3 I don't believe I have heard any discussion as to why the
4 settlement agreement itself would even be relevant to the
5 moving plaintiffs' cases.

6 In addition, I just want to note that the
7 production of these settlement agreements would potentially
8 chill future settlements between OEMs and the defendants. As
9 Goodyear notes, confidentiality is a critical component to
10 achieving a settlement. And the plaintiffs noted in their
11 briefing that no OEMs have filed the case but they never
12 asked themselves why, and the likely reason why, of course,
13 is the OEMs and the defendants are resolving their cases.
14 They have been relying on Goodyear and they have been relying
15 on the general respect that courts have for the
16 confidentiality of settlement agreements that they only be
17 produced, the actual settlement agreement, at the point which
18 they are necessary in a case and not until then.

19 So I would ask Your Honor to be mindful of that and
20 respectfully ask Your Honor not to compel production of the
21 settlement agreements, instead let the defendants and the
22 plaintiffs discuss their potential relevance because we don't
23 know what the relevance of the actual agreement might be as
24 opposed to the briefing focused on which were the
25 communications, and then we can bring it before Your Honor if

1 there is a further dispute.

2 SPECIAL MASTER ESSHAKI: Again, my response would
3 be that in the interest of time, because time is of the
4 essence today in this case, I am going to order that the
5 settlement documents be produced. There are two options; one
6 is you can engage in negotiations with the plaintiffs to see
7 if they are willing to negotiate something less than full
8 production of the settlement agreements or all of the
9 settlement agreements between now and the time that the
10 matter is presented before Judge Battani, or you can take the
11 entire matter before Judge Battani on the relevancy of the
12 settlement production and my order that they be produced.

13 MR. FENSKE: All right. Just so the record is
14 clear, our position would be because they didn't open it
15 in -- or address settlement agreements in their opening brief
16 that they waived their right to seek those, so the record is
17 clear on that. Thank you, Your Honor.

18 SPECIAL MASTER ESSHAKI: I don't see that would
19 prevent them from serving a subpoena tomorrow asking for
20 them, that's why I am saying it is in the interest of saving
21 time.

22 MR. FENSKE: Thank you.

23 SPECIAL MASTER ESSHAKI: Thank you. Okay. The
24 next issue that we have on our agenda today is Denso's motion
25 regarding discovery with respect to the original equipment